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NOTES

CIVIL RIGHTS IN EMPLOYMENT AND THE MULTINATIONAL CORPORATIONS*

The Civil Rights Act of 1964 (CRA)¹ made discrimination in employment on the basis of race, color, religion, sex, or national origin illegal. It also established an Equal Employment Opportunity Commission (EEOC) with power to issue interpretive regulations and to hear discrimination complaints. During the last 12 years an extensive case law has been generated by the EEOC and the courts delineating the types of practices which the law forbids.

With the increase in the number and size of American-based multinational enterprises (MNEs)² in recent years, the issue has arisen as to whether the CRA has any application outside the territorial United States. Several other factors have served to intensify the importance of this problem such as the reappearance of the Arab boycott, statements at presidential press conferences, and letters to the Attorney General by several members of Congress.³

Clearly, there are important implications which would flow from the enforcement of the CRA against American employers abroad. At the very least, enforcing the CRA would change the way some American corporations do business abroad. American-based multinationals might

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1. Civil Rights Act of 1964, 42 U.S.C. §§ 1971 *et seq.* (1970) [hereinafter cited as CRA]. Only Title VII of this Act deals directly with private employment, the subject of this Note.

2. There are acute problems in defining what is meant by the term "multinational enterprise," particularly in a legal context. These problems have given rise to much debate as to the meaning of the term. The term will be used here to refer to large organizations with significant and growing international involvement. They may encompass one or more corporations and need not have strong centralized management. This is an approximation of the definition used in Boddewyn & Kapoor, *The External Relations of American Multinational Enterprises*, in *MULTINATIONAL CORPORATIONS AND WORLD ORDER* 31 (G. Modelski ed. 1972). For a discussion of this definitional problem, see R. TINDALL, *MULTINATIONAL ENTERPRISES* (1975); Bauer, *The Indefinitely Defined Multinational*, 12 CONF. BD. REC. 21 (1975).

3. Statement by President Gerald R. Ford, N.Y. Times, Mar. 6, 1975, at 1; Letter to Attorney General Edward Levi from Congressmen Thomas P. O'Neill, Jr., John J. McFall, Morris Udall, Sidney R. Yates, John J. Rhodes, John B. Anderson, Edward P. Boland, and Elizabeth Holtzman, Mar. 4, 1975.

be placed at a competitive disadvantage in world markets, recruitment and promotion strategies at home could be affected, and corporate investment decisions concerning whether to "base" the MNE outside the United States might change. The effect on the domestic economy of any large scale emigration of capital caused by companies establishing their base of operations elsewhere would, of course, be disastrous. Solely because of the immense volume of business conducted by American MNEs, any policy determination with such uniform application would undoubtedly have serious foreign policy consequences. The analysis of whether the CRA has any extraterritorial application must reflect a sensitivity to these considerations.

I

A. HISTORY LEADING UP TO THE CIVIL RIGHTS ACT OF 1964

The CRA was the result of many earlier attempts to enact a comprehensive anti-discrimination statute, and many of the CRA's provisions are directly traceable to earlier drafts of the legislation. The first efforts occurred during World War II when several executive orders were promulgated banning discrimination "to encourage full participation in the national defense program."⁴ These early executive orders each created a Fair Employment Practices Committee whose job it was to hear complaints and recommend remedial action. In addition to having a very limited number of staff employees and no enforcement powers, these early "FEP" Committees were limited in their jurisdiction to government employment and government contract employment. Not until 1961, under the Kennedy Administration, did such a committee have remedial powers of its own.⁵ This committee, called the President's Committee on Equal Employment Opportunity, was given power to issue regulations, require compliance, and to hold hearings on individual complaints. The Kennedy Executive Order also required all government contracts to include a provision that contractors take affirmative action to ensure that applicants are employed and employees are treated without regard to "race, creed, color, or national origin."⁶

4. Exec. Order No. 8,802, 3 C.F.R. 957 (1943); Exec. Order No. 9,346, 3 C.F.R. 1280 (1943).

5. Neither the Truman nor the Eisenhower Executive Orders gave any effective power to the committees. Their functions were primarily to evaluate the government's anti-discrimination program and to issue reports to the President. See Exec. Order No. 10,308, 3 C.F.R. 837 (1951); Exec. Order No. 10,479, 3 C.F.R. 961 (1953); Exec. Order No. 10,925, 3 C.F.R. 448 (1963).

6. Exec. Order No. 10,925, 3 C.F.R. 448 (1963).

Early efforts to enact an anti-discrimination statute were aimed at protecting government employees.⁷ Beginning in 1943, bills were introduced in every Congress to ban discrimination.⁸ Not until 1950, however, did either house pass one of these proposals.⁹ The employment provisions of the bill which eventually was enacted, Title VII of the Civil Rights Act of 1964, contain many similarities to these earlier proposals, particularly to an earlier bill of Congressman Adam Clayton Powell and to the Kennedy Executive Order.¹⁰

B. THE EEOC AND CASE INTERPRETATION

The agency charged with enforcing the CRA as amended is the five-member presidentially appointed EEOC.¹¹ The Commission is responsible for receiving complaints of employment discrimination, attempting by informal methods to reconcile the parties, making findings of fact, issuing remedial orders, and either authorizing the complaining party to seek enforcement within a set time period or seeking enforcement of those orders itself in federal district court.¹² The EEOC also issues regulations and "guidelines" interpreting the provisions of the CRA.¹³

A court, upon finding illegal discrimination, has several remedial powers available, including the issuance of orders enjoining the respondent from engaging in the unlawful employment practice and orders requiring such affirmative action as the court may direct.¹⁴ As interpreted by the EEOC, "affirmative action" is a process of setting and striving for numerical goals of minority groups and females in recruitment, hiring, and promotion in order to increase their representation in

7. Unemployment Relief Act of 1933, Pub. L. No. 5, ch. 17, 48 Stat. 22 (repealed by Congress in 1970).

8. The first such legislation was introduced by New York Congressman Vito Marcantonio of the American Labor Party. H.R. 1732, 78th Cong., 1st Sess. (1943). *See generally* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968) [hereinafter cited as LEGISLATIVE HISTORY].

9. The bill which did pass was a watered-down version of one introduced by Congressman Adam Clayton Powell. His "Fair Employment Practices Act," H.R. 4453, 81st Cong., 1st Sess. (1949) [hereinafter cited as the Powell Bill] was replaced by a substitute offered by Congressman Samuel K. McConnell on the floor of the House, after having been voted out favorably by the Committee on Education and Labor. H.R. REP. No. 1165, 81st Cong., 1st Sess. (1949), substituted on Feb. 23, 1950.

10. H.R. 7152, 88th Cong., 2d Sess. (1964). *See* notes 6 & 9 *supra*.

11. The CRA has been amended several times since it was originally enacted. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; Pub. L. No. 93-608, 88 Stat. 7972 (1975).

12. CRA § 706.

13. CRA § 713.

14. CRA § 706(g).

a given work force. Affirmative action may be required of an employer under certain circumstances even in the absence of proof that some protected group has been traditionally excluded.¹⁵

The case law in this area is fairly well developed and reveals some of the key concepts which will have to be re-analyzed if the CRA is found applicable to the international setting. The EEOC and the federal courts have not, for example, interpreted the CRA as forbidding per se all distinctions on the basis of race, color, religion, sex, or national origin. The CRA explicitly recognizes that employment decisions may occasionally have to be based on a candidate's religion, sex, or national origin, where one of those characteristics constitutes a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise."¹⁶ The standards for what constitutes a so-called BFOQ, however, are very stringent. The major case interpreting the BFOQ clause, *Diaz v. Pan American World Airways*,¹⁷ involved a man claiming to have been discriminated against on the basis of sex because of Pan Am's policy of hiring only female stewardesses. The airline argued that sex was a BFOQ for the position of "flight attendant" because of customer preferences and because of an alleged superior ability of women to perform the "non-mechanical aspects of the job." The court held for the plaintiff attendant, however. It said that while a male steward is perhaps not as soothing on a flight as a female stewardess, a BFOQ could be found only if the discrimination was a fulfillment of a "business necessity," not a mere "business convenience."¹⁸ The argument of "customer preference" was similarly found insufficient:

Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.¹⁹

The other major case interpreting the CRA was *Griggs v. Duke Power Co.*,²⁰ in which a group of black employees of the Duke Power Company challenged the requirement that an applicant for certain manual labor

15. CCH EEOC COMPLIANCE MANUAL ¶ 3351 (1976).

16. CRA § 703(e). [This kind of exception will hereinafter be cited as a "BFOQ."].

17. 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

18. *Id.* at 387-88.

19. *Id.* at 389.

20. 401 U.S. 424 (1971). Other major cases interpreting the CRA include: *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

jobs had to either pass an intelligence test or possess a high school diploma. The Supreme Court observed that as a consequence of these job requirements, a disproportionate number of blacks were excluded from being hired or promoted. Relying on the EEOC's guidelines, that only through use of tests shown to be "job-related"²¹ can employment screening be performed consistently with the CRA, the Court struck down the Griggs employment requirements. The fact that the employer had "good intent" was of no avail in the face of "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."²² The actual discriminatory impact of the test required that the employer carry a burden of showing the test to be necessary to the primary functioning of the enterprise. The Court stated that the Act forbids both overt discrimination and seemingly neutral practices which are discriminatory in their operation. As the Court said:

The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.²³

The issues at the heart of cases like *Diaz* and *Griggs* become not only domestic problems but international ones as well if the CRA is applied overseas. If the Civil Rights Act is brought to bear on the employment policies of multinational enterprises, among the first questions asked will be whether customer preference in the international setting carries any more weight than it does domestically. Clearly, the extraterritorial situation is qualitatively different than the purely domestic one because in the former setting the customer usually will have recourse to an alien competitor's service which is not regulated by the CRA or equivalent statutes. In addition, the courts will have to resolve the question of whether neutral screening devices, such as employee eligibility to obtain certain foreign visas, are founded upon business necessity of sufficient import to be declared within the ambit of BFOQ. These questions only hint at the changes in business operations foreign application of the CRA may provoke.

21. Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1971).

22. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

23. *Id.* at 431.

II

CIVIL RIGHTS ACT JURISDICTION

A. LANGUAGE OF THE STATUTE

The Supreme Court has said that whether or not a statute has extra-territorial application turns on Congressional intent.²⁴ In the case of *McCulloch v. Sociedad Nacional de Marineros de Honduras*,²⁵ for example, the Court was asked to determine whether the National Labor Relations Act²⁶ applied outside the territorial United States to foreign flag vessels beneficially owned by United States corporations.²⁷ The Court reaffirmed its earlier position that "for us to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.'"²⁸ In the absence of any such expression in the Act, the Court held that the National Labor Relations Board was without jurisdiction to order an election on board the "foreign" vessel docked at an American port. "In fact," said the Court, "we conclude here that the arguments should be directed to the Congress rather than to us."²⁹ By the same token, the applicability of the CRA abroad turns on whether there is any evidence of such a Congressional intention in the statute.

As noted earlier, the general rule of the CRA prohibits any covered employer from discriminating against an individual because of "race, color, religion, sex, or national origin."³⁰ Not all employers, however, are "covered employers." Some are excluded because they are too small while others are excluded because they do not affect interstate commerce.

The CRA definition of "employer" states:

"[E]mployer" means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person, but such term does not include (1) the United States, a corpora-

24. See *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Bowman*, 260 U.S. 94 (1922); *United States v. Bennett*, 232 U.S. 299 (1914).

25. 372 U.S. 10 (1963). The Court in *McCulloch* had combined three cases for joint consideration.

26. 29 U.S.C. §§ 151 *et seq.* (1970).

27. See Comment, *Foreign Flag Ships in American Ports: The Question of NLRB Jurisdiction*, 9 CORNELL INT'L L.J. 50 (1975).

28. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963).

29. *Id.* at 22.

30. CRA § 703.

tion wholly owned by the Government of the United States . . . or (2) a bona fide private membership club. . . .³¹

The CRA definition of the term "employer" was carefully drafted so as to encompass an increasing number of employers over time. The minimum number of employees necessary for an employer to be covered under the Act was initially programmed to be reduced in steps over a four-year period, meaning that only the very largest employers have been covered from the CRA's outset.³² If the Act does apply to American employers abroad, this initially staggered application may have an effect on the extent of remedial action necessary.³³

It is unclear from the debate whether the "employees" referred to in the above definition include those outside the United States. Participants in the original debate about which employers should be covered by the Act made frequent reference to the disproportionate unemployment rates between blacks and whites "in all regions of the country."³⁴ Similarly, the House Judiciary Committee's report accompanying the CRA bill made several references to problems of employment discrimination "in various parts of the country."³⁵ These statements seem to indicate that in counting the requisite number of employees, Congress did not intend to include foreign employees. Since haphazard comments in the course of debate cannot be imbued with meaning be-

31. CRA § 701(b).

32. The bill reported to the House floor provided that the term "employer" would not include persons with less than 100 employees during the first year of the Act, 50 during the second year, and 25 thereafter. An intermediate step of 75 employees the second year was added on the House floor. This was the only change in the definition of "employer" adopted on the floor of either house. LEGISLATIVE HISTORY 1001.

33. See generally LEGISLATIVE HISTORY 1001-02; STATUTORY HISTORY OF THE UNITED STATES, CIVIL RIGHTS, Part II, 1291 (B. Schwartz ed. 1970) [hereinafter cited as STATUTORY HISTORY].

34. See, e.g., STATUTORY HISTORY 1224 (Sen. Hubert Humphrey), 1249 (Sen. Thomas Kuchel), 1293 (Sen. Sam Ervin in opposition), and 1296 (Sen. Edward Kennedy).

Opponents of the bill also commented upon the effects of the CRA's internal jurisdiction. In a *seriatim* review of the proposed legislation, South Carolina's Sen. Olin Johnston offered a common viewpoint when he stated:

In my opinion, title VII . . . is one of the worst sections of the bill. . . .

Title VII sets up an [EEOC] to police and investigate all industries affecting . . . commerce, which includes any activities, business or industry in commerce, and all persons, labor unions, partnerships, associations, corporations, legal representatives, joint stock companies, trusts, unincorporated associations, trustees . . . and even churches. The wide range [sic] exercised in this title will affect virtually everyone doing business in the United States limited in its scope only by the exclusion of businesses hiring small numbers of people

STATUTORY HISTORY 1410-11 (emphasis added).

35. See, e.g., H.R. REP. NO. 914, 88th Cong., 1st Sess. 2018 (1963).

yond the original context, however, it cannot be concluded that these comments indicate a conscious decision to narrow the scope of the legislation's application.

The phrase "person engaged in an industry affecting commerce" is laden with complexities. The definition of the term "person" was seemingly designed to include every conceivable legal entity, from labor unions to trustees in bankruptcy,³⁶ and surely is broad enough to encompass the legal organizational structure of a large number of multinationals.³⁷ However, again it is unclear whether this was intended.

The definitions of the terms "commerce" and "industry affecting commerce" address more directly the issue of international jurisdiction. "Commerce" is defined by the CRA as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a state and any place outside thereof. . . ."³⁸ Not all industries are in "commerce." Some industries are wholly contained within a single state and do not even rise to the constitutional level of commerce "among the several States; or between a state and any place outside thereof."³⁹ While this provision in the CRA indicates an intention to cover at least some commercial enterprises involved in international exchange, it does not necessarily follow that Congress intended to assert jurisdiction over the foreign operations of all multinational enterprises.

There is some additional evidence, however, that Congress did intend to reach the constitutional limit of the Commerce Clause in the separate definition given the phrase "industry affecting commerce." The phrase is defined as being either: "any activity, business, or industry in commerce . . . or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act [LMRDA]"⁴⁰ This suggests that Congress intended CRA coverage to be at least as broad as that of the LMRDA. Although the possibility remains that the Congress was simply inserting a boilerplate designed to invoke its normal territorial constitutional authority, the legislative history of the CRA's "commerce clause" argues in favor of the former interpretation.

36. CRA § 701(a):

"[P]erson" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

Note that the definition of "employer" itself includes the phrase "any agent of such a person." Thus, an agent of a covered employer is also covered.

37. See generally TINDALL, *supra* note 2. See also note 34 *supra*.

38. CRA § 701(g) (emphasis added).

39. U.S. CONST. art. I, § 8(3).

40. CRA § 701(h) (emphasis added).

The key sponsor of the statute in the House, Judiciary Committee Chairman Emmanuel Celler, said in debate:

Title VII covers employers engaged in industries affecting commerce, that is to say, interstate and *foreign commerce* and commerce within the District of Columbia and the possessions.⁴¹

Similar remarks were made by other members.⁴²

The strongest argument in favor of allowing the CRA to apply abroad rests, ironically, on an exemption provision in the Act⁴³ which states in part, "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State"⁴⁴ The legislative history is silent on this section.⁴⁵ However, it is clear from the language that this exemption applies only to the employment by covered employers of *aliens* abroad. It does not apply directly to the employment of aliens in the United States nor to the employment of Americans abroad. More important for our purposes is the logical implication of this exemption. The fact that the Act expressly excludes only aliens working

41. LEGISLATIVE HISTORY 3091 (emphasis added).

42. Senators Clark and Case, the floor leaders of the House-approved H.R. 7152, submitted an "Interpretive Memorandum on Title VII" into the Congressional Record on April 8, 1964. LEGISLATIVE HISTORY 3039. It stated, in pertinent part:

"Commerce" is, generally speaking, interstate commerce, but includes commerce within U.S. possessions and the District of Columbia. It is, in short, that commerce to which the regulatory power of Congress extends under the Constitution, a familiar concept which has been employed in other Federal statutes. The term "affecting commerce" is also familiar, since this is the standard of coverage employed in the National Labor Relations Act, 29 United States Code 152 (6),(7), and the Labor-Management Reporting and Disclosure Act of 1959, 29 United States Code 402(c).

See also opinions on the constitutionality of the Act expressed by various individuals and organizations inserted into the Congressional Record. *Id.* at 3075-91. Cf. Note, *Title VII: How To Break The Law Without Really Trying*, 21 CATH. U. L. REV. 103 (1971).

43. CRA § 702.

44. CRA § 703.

45. "According to the records, the measure was considered and debated by the House Judiciary Committee 22 days, by the Rules Committee seven days, by the House six days, and by the Senate 83 days. The extended debate in the Senate lasted 534 hours, 1 minute, and 37 seconds." LEGISLATIVE HISTORY 11. In that entire debate § 702, the exemption clause, received no more than passing attention. The language was apparently borrowed from the original Powell Bill of 1950:

Sec. 4. This Act shall not apply to any employer with respect to the employment of aliens outside the continental United States, its Territories and possessions.

Fair Employment Practices Act, H.R. 4453, 81st Cong., 1st Sess. (1949), reported out of the Committee on Education and Labor, H.R. REP. NO. 1165, 81st Cong., 1st Sess. (1949). Although there was no reported discussion of the exemption provision in the original Powell Bill, the McConnell Bill, which was substituted for the Powell Bill by the House on Feb. 23, 1950, did not include an exemption clause.

for covered employers abroad logically implies its inclusion of Americans working for covered employers abroad. If Congress intended to exempt all discrimination by American employers "outside any State," complete silence on the question would have been stronger evidence of such a Congressional intent.

Furthermore, there is no jurisdictional problem under international law raised by a construction of the CRA which concludes that the American employees abroad of American employers are covered. In those instances where the parent multinational is either American-based or staffed with Americans, the basis for the assertion of this type of prescriptive jurisdiction is most clear. In *Skiriotes v. Florida*,⁴⁶ there was a confluence of two long-recognized independent bases for extraterritorial prescriptive jurisdiction: nationality and the protective principle.⁴⁷ In *Skiriotes* the Supreme Court held that it was within the power of Florida to forbid a certain kind of sponge diving by its citizens, despite the fact that the conduct took place just beyond the state's territorial waters. The Court concluded:

Thus, a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.⁴⁸

Although the injury caused by the discrimination against American citizens abroad is less tangible than a citizen's stripping the ocean floor of sponge, it is no less directly injurious or less directly related to a culpable national. Employment discrimination makes for inefficient allocation of human resources, as work assignments by definition are not job-related where there is discrimination.⁴⁹ In addition, there is an adverse psychological impact on the discriminated-against group at home. The social goal of upward mobility is set back, as is the related goal of opportunity. This is due in part to the fact that in multinational enterprises foreign assignment is often a prelude to advancement at home. Finally, discrimination against minority workers explains, at least in part, their disproportionately high unemployment rate, and the problem of unemployment among American minorities has been "inextricably linked" with civil disorders in American cities.⁵⁰

46. 313 U.S. 69 (1941).

47. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 7 (1965).

48. 313 U.S. at 73-74.

49. Cf. discussion of the *Griggs* case in the text accompanying note 20 *supra*.

50. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 231 (1968).

Thus, where the staff of the multinational are American or the parent corporation is American, the nationality principle gives ample basis for an exercise of either criminal or civil jurisdiction. Where this is not the case, the protective principle still permits the United States to forbid external acts which cause internal harm. Finally, there is an additional basis for jurisdiction, not universally recognized, under which a state may impose a penalty for injury to one of its nationals living abroad. This may also provide a basis for jurisdiction.⁵¹

Therefore, although the CRA's legislative history is unclear on the question of its applicability to the foreign operations of covered employers, and the language of the statute's general provisions does not explicitly forbid its foreign application, the existence of an exemption clause for aliens abroad does indicate that Americans abroad working for covered employers are covered. In addition, there does not appear to be any barrier in international law preventing extraterritorial application of the CRA. Certainly at the time of the CRA's passage there was every reason to believe Congress thought it was exercising all of its constitutional commerce power and that such power would cover American employers home and abroad. At the very least, then, there is a colorable case for the extraterritorial application of the CRA.

B. CASE INTERPRETATION

There is no case law exactly on point, but in *Espinoza v. Farah Manufacturing Co.*⁵² the Supreme Court considered the significance of the exemption clause and drew an inference from it in much the same way as proposed above. The Court held that Title VII "was clearly intended to apply with respect to aliens inside any State,"⁵³ because the exemption clause excluded only external aliens. The action was initiated by a Mexican citizen's complaint of discrimination on the basis of national origin against a southwest textile manufacturer who refused to hire her. The Court held that the manufacturer's exclusion of the plaintiff alien from employment did not constitute discrimination on the basis of national origin in light of the employer's substantial number of Mexican-American employees. Discrimination on the basis of alienage, the Court ruled, was not prohibited by the CRA. As the Court said:

We agree that aliens are protected from discrimination under the Act. That result may be derived not only from the use of the term "any

51. See generally RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES; I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2d ed. 1973).

52. 414 U.S. 86 (1973).

53. *Id.* at 95.

individual" in § 703, but also as a negative inference from the exemption in § 702, which provides that Tit. VII "shall not apply to an employer with respect to the employment of aliens outside any State. . . ." 42 U.S.C. § 2000e-1. Title VII was clearly intended to apply with respect to the employment of aliens inside any State.

The question posed in the present case, however, is not whether aliens are protected from illegal discrimination under the Act, but what kinds of discrimination the Act makes illegal.⁵⁴

Just as the Court drew a negative inference from the exemption clause that aliens in the United States are covered, one may similarly infer from the exemption of aliens abroad that Americans abroad are included within the statutory provisions.

C. ANALOGOUS STATUTES

There are several federal statutes which are similar in nature to the CRA. They also seek to regulate employer-employee relations, have acknowledged wide domestic application, and are administered by specialized administrative agencies. By studying how the courts have applied these statutes abroad we can gain clues as to how the courts will interpret the CRA.

One such statute, the Labor Management Relations Act,⁵⁵ is the cornerstone of modern American labor relations. Yet, while the Supreme Court has recognized that the Congress has the power to extend the jurisdiction of the Act beyond the territorial limits of the United States, it has been firm in its opinion that Congress has not done so.⁵⁶ The Court said in *McCulloch*⁵⁷ that Congress had not demonstrated the requisite

54. *Id.* Interestingly, in reaching this conclusion, the Court made reference to an EEOC General Counsel Opinion Letter which "was addressed to the question whether it was lawful to discriminate against nonresident aliens in favor of citizens and against resident aliens, and expressly reserved any decision 'regarding discrimination in favor of United States citizens and resident aliens.'" EEOC General Counsel's Opinion Letter, 1 CCH EMPLOYMENT PRAC. GUIDE ¶1220.20 (1967), referred to in 414 U.S. 86, 94 n. 7 (1973). On the assumption that this opinion and several others might contain further interpretive material on the exemption clause, an attempt was made to obtain a copy from the Office of General Counsel of the EEOC. The attempt was unsuccessful. The Commission stated that it does not have a copy of its opinion letter relied upon by the Supreme Court, nor of several other related opinion letters. Letter from Constance L. Dupre, Acting Associate General Counsel, Legal Counsel Division, EEOC, Nov. 18, 1975, on file at the Cornell International Law Journal Office.

55. 29 U.S.C. §§ 141 *et seq.* (1970) [hereinafter cited as LMRA].

56. See generally Goldberg, *Labor Relations and Labor Standards for Employees of United States Enterprises Working in Foreign Areas*, 48 N. DAKOTA L. REV. 23, 24-28 (1971); Comment, *supra* note 27, at 55-62, 65-69.

57. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

"clear" intent in the LMRA⁵⁸ and that the protections of the LMRA therefore did not extend to American sailors aboard "Panlibhon"-registered American-owned merchant vessels.⁵⁹ This holding, however, does not necessarily mean that the Court would not interpret the CRA as protecting the American employees of certain American employers working abroad. While the "commerce clauses" of the two statutes are virtually identical,⁶⁰ the existence of the CRA exemption clause might well supply the necessary explicit language indicating the Congressional intention absent in *McCulloch*.

Another analogous statute is the "Eight Hour Law,"⁶¹ which provides that all government contracts shall contain clauses stating that no employee shall be permitted to work more than eight hours in any one calendar day.⁶² In the case of *Foley Bros. v. Filardo*,⁶³ as in *McCulloch*, the Supreme Court ruled that the jurisdiction of the statute did not extend to an American employee working for an American employer outside the United States.⁶⁴ The Court again premised its conclusion on the absence of any evidence in either the Act or its legislative history that Congress "entertained any intention other than the normal one," that Congress was primarily concerned with "domestic conditions."⁶⁵ In reaching its conclusion, the Court also relied on the fact that the history of the Act revealed affirmative Congressional concern with the domestic labor situation and on the fact that administrative interpretations of the Act provided "no touchstone by which its geographic scope can be determined."⁶⁶ The Court seemed particularly impressed by the fact that the President had declared its application suspended at times in the past. The Court said:

58. *Id.* at 22.

59. Note, *Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts*, 60 COLUM. L. REV. 711 (1960); Comment, *supra* note 27, at n.9.

60. Compare the CRA "commerce clause," text accompanying note 38 *supra*, with the LMRA "commerce clause," 29 U.S.C. § 152(6) (1970).

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia. . . .

See also notes 41 & 42 *supra*.

61. The Work Hours Standard Act, 40 U.S.C. §§ 321-326 (1974).

62. 40 U.S.C. § 324 (1974).

63. 336 U.S. 281 (1948).

64. The employee in *Foley Bros.* was working in both Iraq and Iran. The Court carefully steered away from reaching any decision as to the "precise geographic coverage of the Eight Hour Law." *Id.* at 286, n.2.

65. *Id.* at 285.

66. *Id.* at 288.

The scheme of the Act itself buttresses our conclusion. No distinction is drawn therein between laborers who are aliens and those who are citizens of the United States. Unless we were to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and beyond the control of this nation. An intention so to regulate labor conditions of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.⁶⁷

The interpretations of these and other analogous statutes indicate, then, that the Court has been reluctant to assert a statute's jurisdiction extraterritorially without explicit instructions to that effect from the Congress.⁶⁸ At the same time, however, it is also clear that the Court looks to the legislative history and administrative interpretation as well as the actual language of the statute in order to ascertain the intent of Congress.⁶⁹ Applying these factors to the case at hand, the possibility at least exists that the CRA has extraterritorial application.

D. ADMINISTRATIVE INTERPRETATIONS

The CRA is the subject of constant litigation, interpretation and analysis.⁷⁰ It should come as no surprise that the question of the jurisdiction

67. *Id.* at 286.

68. See generally Goldberg, *supra* note 56.

69. The Court has also treated civil rights statutes with particular sensitivity in our recent history. This may be an important factor in any decision the Court might reach regarding the CRA. *E.g.*, in *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963), the Court was faced with a state civil rights statute which had been applied across state boundaries to a black applicant for a position as a Continental pilot. The Supreme Court of Colorado had found this exercise of authority to be an unconstitutional burden on interstate commerce. In reversing the Colorado court, Mr. Justice Black, for a unanimous Supreme Court, said, in passing:

The obvious importance of even partial invalidation of a state law designed to prevent the discriminatory denial of job opportunities prompted us to grant certiorari.

372 U.S. at 717. The substance of this case is not entirely different from what one might expect to find in the controversy which brings the issue of the extraterritorial application of the CRA before a federal court.

70. The EEOC's current backlog of employment discrimination complaints is 106,700. The EEOC estimates that the backlog will increase to between 114,300 and 150,000 by fiscal year 1977. 197 BNA DAILY LAB. REP. A-3 (Oct. 9, 1975). At the same time, a sharp upturn in United States foreign business has been predicted for this decade, Rhodes, *Upturn in Foreign Activity by U.S. Business*, 8 COLUM. J. WORLD BUS. 19 (1973), resulting in a growing labor force abroad.

of the CRA over American employees of covered multinationals has generated several official Justice Department position papers and EEOC Opinion Letters. These letters, prepared by the EEOC Office of General Counsel, do not have the force of law but do reflect the position of the primary administrative agency charged with enforcing the CRA.⁷¹ The Supreme Court has relied on these Opinion Letters on occasion to demonstrate the absence of consistent administrative interpretation of a CRA provision.⁷² In addition, various large employers have taken positions on the foreign application of the CRA. For example, the American Telephone & Telegraph Company, which has had more than its share of dealings with the CRA,⁷³ is of the opinion that the Act applies to its American employees abroad.⁷⁴ On the other hand, the International Business Machines Company, when asked whether it believed the CRA applied abroad, reflected a more widespread business community senti-

71. The Justice Department has greater primacy than usual because it was originally the agency charged with interpreting the CRA.

72. See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

73. In 1973, the American Telephone & Telegraph Company, hereinafter cited as AT&T, signed an agreement with the EEOC costing more than \$50-million to wipe out vestiges of past discriminatory practices in employment. CCH LAB. L. REP., EMPLOYMENT PRACTICES (extra ed. 1973); *Equal Employment Opportunity Agreement between the AT&T Co. and EEOC and U.S. Dept. of Labor* (Jan. 18, 1973) [hereinafter cited as *AT&T Settlement*]. The original cost of the settlement was reported at \$38-million; \$15-million in back pay and \$23-million a year in raises. After the agreement was signed the cost estimate was pushed up to \$50-million by new predictions as to the number of employees who would come forward. N.Y. Times, Jan. 10, 1973, at 1; N.Y. Times, Feb. 12, 1974, at 36. The vestigial discriminatory practices referred to in the agreement included exclusion from consideration for certain jobs on the basis of sex, the use of equally-biased criteria for certain promotions, and different pay scales for men and women for identical work. Pati & Fahey, *Affirmative Action Program: Its Realities and Challenges*, 24 LAB. L. J. 351, 358-59 (1975). The payments were made to employees who had been potentially excluded from consideration for various job opportunities on the basis of their sex. Payments took the form of lump sum distributions of between \$100 and \$400. Approximately 15,000 employees were affected. The agreement, however, also provides for the development of goals and time tables for increasing minority and female representation in the company's ranks. See *AT&T Supplemental Bias Order*, 8 BNA LAB. REL. REP., FEP MAN. 431:124a. "The \$15-million back pay will constitute, by far, the largest such settlement ever made. Several settlements around \$1-million had been made earlier." N.Y. Times, Jan. 19, 1973, at 1. Since the signing of the above agreement, however, the steel industry has agreed to what may be an even larger settlement. N.Y. Times, Apr. 16, 1974, at 1; 8 BNA LAB. REL. REP., FEP MAN. 431:72a. \$30.94-million was awarded collectively to 40,000 employees. In addition to back pay, this agreement, between 9 major steel companies, the United Steelworkers Union, and the Department of Justice, includes goals and time tables for hiring minorities and females, and a revised seniority system.

74. Letter from F.J. Peters, Personnel Manager—EEO Policy & Compliance, AT&T, to Harold Levy, Dec. 17, 1975, on file at Cornell International Law Journal Office.

ment when it responded: "IBM does not."⁷⁵

The Department of Justice has issued repeated opinions on the matter in the form of written statements delivered before congressional committees. In 1975, in response to a legislative proposal by Reps. Elizabeth Holtzman and Peter Rodino to prohibit "economic coercion" based on religion, race, national origin, sex, and certain other factors,⁷⁶ Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, testified before Congress:

[T]he [CRA] contains an exemption "with respect to the employment of aliens outside any State," which implies that it is applicable to the employment of United States citizens by covered employers anywhere in the world.⁷⁷

The proposed legislation, aimed at undermining the Arab boycott of firms doing business with Israel or employing "Zionists,"⁷⁸ was opposed

75. Letter from G.Y. Poetto, IBM Corporate Information, Armonk, N.Y., to Harold Levy, Oct. 27, 1975, on file at Cornell International Law Journal Office.

76. H.R. 5246, 91st Cong., 1st Sess. (1975).

77. Statement of Antonin Scalia, Assistant Attorney General, before the Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary, July 9, 1975 [hereinafter cited as *Scalia*].

Perhaps part of the reason why so few employers seem to be aware of the CRA's application abroad is that Scalia's statement was not reported in either the popular press or in the international trade publications. Cf. N.Y. Times, July 10, 1975; *Antitrust: Justice Opposes Holtzman Bill to Penalize Arab Inspired Economic Boycott*, 64 ITEX E-4 (July 15, 1975). Interestingly, while ITEX reported Congresswoman Holtzman's statement that the antitrust laws might be broadened through judicial interpretation to cover discriminatory secondary boycotts, Scalia's testimony was merely summarized as "opposition" to the bill. See also Testimony of Antonin Scalia, Assistant Attorney General, *Hearings Before the Subcomm. on International Trade and Commerce*, HOUSE COMM. ON FOREIGN AFFAIRS, Mar. 13, 1975 (on the Legal Issues Under Civil Rights and Antitrust Laws Regarding the Arab Boycott); Testimony of Antonin Scalia, Assistant Attorney General, *Hearings Before the Subcomm. on Government Information and Individual Rights*, HOUSE COMM. ON GOVERNMENT OPERATIONS, Apr. 9, 1975 (on Federal Civil Rights Laws Relating to Overseas Assignments); Testimony of Antonin Scalia, Assistant Attorney General, *Hearings Before the Subcomm. on International Finance*, SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, July 22, 1975 (on Amendment No. 24 to S.425 and S. 953).

78. The importance of the Arab Boycott in an economic sense has only become manifest since the recent influx of "petrodollars" to the Arab countries. Trade between the United States and the Middle East, for example, has risen from \$1-billion in 1971 to a predicted \$7-billion this year. BUS. WEEK, May 26, 1975, at 38. Despite the increase in the boycott's potential effectiveness, however, whether it has been aimed at Jews or Zionists has remained the object of much controversy. Bender, *Arab Attempts to Influence Dealings With Jews Stirs Furor*, N.Y. Times, Mar. 4, 1975, at 43, col. 3. A statistical study prepared by the Beirut-based "Institute for Palestine Studies" on the effectiveness of the boycott refers only to "Zionist" activities. A. SHARIF, A STATISTICAL STUDY ON THE ARAB BOYCOTT OF ISRAEL (1973). Nonetheless, various Jewish groups have been vigorous in their charges

by the Department of Justice as unnecessary with respect to its impact on American employment policies both at home and abroad.⁷⁹ In describing the practical effects of the bill, the Department spokesman indicated that it would make "no discernible change" in the current law, which already covers American employers abroad with regard to their American employees.⁸⁰ Thus, the Department of Justice found the bill, directed at economic coercion on American employers in their employment policies abroad, unnecessary in large part⁸¹ because the problem is already covered by the CRA. It is worth noting that the legislation subsequently passed apparently does not directly address the problem of MNE employment discrimination abroad.⁸²

Finally, there is the EEOC's position as to whether the Act it administers has any extraterritorial effect. The opinion of the Commission is particularly important on the issue of extraterritorial application because the Supreme Court has said that the EEOC's opinion must be

of anti-semitism. N.Y. Times, Mar. 3, 1975, at 43. Determining precisely at whom the boycott is aimed is complicated by the fact that each Arab nation has a variation on the boycott list. 78 U.S. NEWS & WORLD REP., Mar. 17, 1975, at 65. Even President Ford and the State Department have separately expressed concern about "reports that it (the boycott) could be used for discrimination on outright religious grounds," 72 DEP'T STATE BULL. 451, 452 (1975). The fact that the boycott is not strictly complied with, even by the Arab governments themselves, also makes for confusion. Wash. Post, May 18, 1975, at 2. It can be seen that the fact that the boycott has been conducted in a somewhat haphazard manner makes a conclusion that it is aimed against Jews, rather than Zionists, problematic. The most helpful discussion of the boycott's true target is Guzzardi, Jr., *That Curious Barrier on the Arab Frontiers*, 92 FORTUNE, July, 1975, at 82.

79. *Scalia 18 et seq.* Although the Scalia statement seems to blur the distinction, it is worth bearing in mind that the CRA goes only to the employment of Americans abroad, not the employment of aliens by American employers abroad.

80. *Scalia 18 et seq.*

81. Scalia did not oppose the entire bill since the Justice Department explicitly endorsed making "coercion to discriminate" also a violation of the law.

I may note that the single substantive provision of the bill which we support, we support not as a response to the Arab boycott: The prohibition of coercion to discriminate on the grounds of religion, race, national origin or sex seems to us a sound addition to domestic civil rights law, Arab boycott or no. It would have the effect, however, of providing a clear remedy against some of the most obvious practices alleged to have resulted from the boycott, whereby various firms have supposedly been pressured to discriminate among their suppliers, customers or even officers, on the basis of religion. It will not reach such pressure exerted by Arab governments themselves, but I know of no way to achieve that result except at the inordinate cost of a provision like subsection (b) [of the Holtzman-Rodino Bill].

Scalia 22.

82. See 15 C.F.R. § 369 (1976); 50 App. U.S.C. § 2403(a)(2) (1974). See also *Arab Secondary Boycott*, 51 N.Y.U.L. Rev. 94 (1976).

given "great deference" by the courts.⁸³ The conclusion reached by two successive EEOC General Counsels is that the CRA does apply abroad. In a letter to Senator Frank Church, dated March 5, 1975, EEOC General Counsel William A. Carey said that Congress had intended to make Title VII applicable to American citizens employed by American companies operating overseas.⁸⁴

Giving Section 702 [the exemption clause] its normal meaning would indicate a Congressional intent to exclude from the coverage of the statute aliens employed by covered employers working in the employers' operations outside of the United States.⁸⁵

The General Counsel's Opinion Letter carefully traces the basis for congressional authority to assert jurisdiction abroad and concludes that the rules of statutory construction developed by the Supreme Court require that the CRA be interpreted as applying abroad.

The reason for such exclusion is obvious; employment conditions in foreign countries are beyond the control of Congress. The section does not similarly exempt from the provision of the Act, U.S. Citizens [*sic*] employed abroad by U.S. employers. If Section 702 is to have any meaning at all, therefore, it is necessary to construe it as expressing a Congressional intent to extend coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute.⁸⁶

This Opinion Letter corresponds almost verbatim with one recently issued by EEOC General Counsel Abner W. Sibal, pursuant to a Freedom of Information Act request.⁸⁷

While there has been no authoritative court interpretation of the CRA, there appears to be a substantial possibility that the Act will be applied abroad in view of both the consistent administrative

83. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93-94 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

84. Letter to Sen. Frank Church from William A. Carey, EEOC General Counsel, Mar. 17, 1975.

85. *Id.*

86. *Id.*

87. Letter to Harold Levy from Abner W. Sibal, EEOC General Counsel, Nov. 12, 1975. *Accord*, Letter from Constance L. Dupre, *supra* note 54. The Dupre Letter also made explicit the fact that the EEOC was of the position that the CRA applied only to *American* employers' foreign operations:

Finally, you ask the position of the Commission with regard to the applicability of Title VII to the alien employers who recruit in this country. Title VII is applicable to the operations in the U.S. of alien employers. It is not applicable to their foreign operations, even with regard to employees recruited in the U.S.

interpretations by the agencies most directly involved in the Act's enforcement and the evident congressional intent expressed in the body of the statute.⁸⁸ In order to weigh the significance of this conclusion the implications of the Act's foreign application must be examined.

III

IMPLICATIONS OF EXTRATERRITORIAL APPLICATION

The fact that American MNEs are so politically and financially powerful means that any across-the-board change in the enforcement of statutes applicable to such enterprises will have far-flung repercussions. Although these consequences may not directly influence a court's decision on whether to assert extraterritorial jurisdiction under the CRA, they will surely affect Congress' judgment in deciding whether to amend the statute. They will also affect the business practices of MNEs, the policies of host governments, and the general business climate in the United States.

The degree to which extraterritorial enforcement of the CRA would benefit individuals abroad is somewhat uncertain. No statistics are available as to either the number of American citizens abroad working for American-based employers or the number of discrimination complaints received by the EEOC from American citizens employed abroad by United States employers.⁸⁹ However, it is known that the EEOC has received such complaints in the past.⁹⁰ In addition, the number of citizens abroad who are not employees of a government, not self-employed, and not dependents of government employees was over 60,000 in 1970.⁹¹

88. The existence of an available statute minimizes the need for additional legislation, at least with regard to American employees, which was so vigorously advocated by Dehner, Jr., *Multinational Enterprise and Racial Non-Discrimination: United States Enforcement of an International Human Right*, 15 HARV. INT'L L.J. 71 (1974).

89. Neither the Bureau of the Census nor the Departments of Commerce or Labor have these employment figures. On the matter of the EEOC complaints, the Dupre letter, *supra* note 54, indicated no figures were available.

90. Letter from Constance L. Dupre, *supra* note 54.

91. See Table 25, *Economic Characteristics of "Other Citizens" Abroad . . . 1970*, Bureau of the Census, Americans Living Abroad, Subject Reports, (1970) PC(2)-10A at 103. There were 61,036 United States citizens working abroad for "private employers." What proportion of these employers was American is unknown. It is likely, however, that many were employed by American-based multinationals. Franko, *Who Manages the Multinational Enterprises*, 8 COLUM. J. WORLD BUS. 30 (1973).

The ethnic breakdown of United States citizens working for American employers abroad is also difficult to determine. There are a total of 70,000 United States citizens abroad who are neither working for the United States nor dependents of someone working for the United States. This figure includes United States citizens working for foreign governments

While this number is not large in comparison to the total number of employees of American-based multinationals around the world,⁹² it does represent potentially significant legal liability which cannot be ignored.⁹³

A. THE MULTINATIONAL ENTERPRISE

Extraterritorial application of the CRA holds implications for MNEs in both the affirmative action and the business planning areas. Affirmative action is, generally speaking, a wholly domestic concept. It is pri-

and those who are self-employed. The demographic characteristics of this larger group may well reflect the characteristics of the subset of American employees of American employers:

68,200 white	50,000 male
1,800 other	20,000 female

In addition, the median years of schooling received is 16.3 years. Only 10% did not finish high school. Table 30, *Social and Occupational Characteristics of Employed "Other Citizens" Abroad . . . 1970*, Bureau of the Census, *supra*, at 144.

92. In 1970 the Commerce Department issued the results of a survey showing that the 298 responding majority-owned foreign affiliates employed 5-million people around the world. This was up almost 28% from the 1966 benchmark figure of 3.9-million persons. "While the universe of United States foreign direct investors is not covered, the sample, which comprises a significant segment of the larger firms, does give a relatively accurate impression of the situation in 1970." The names of the surveyed firms were compiled from various national lists of the largest corporations and from those corporations filing quarterly reports with the Bureau of Economic Analysis. This latter group includes those businesses "who had financial transactions of more than \$500,000 with their foreign affiliates." BUREAU OF ECONOMIC ANALYSIS, DEPARTMENT OF COMMERCE, SPECIAL SURVEY OF U.S. MULTINATIONAL COMPANIES, 1970 (Nov. 1972). See also U.S. TARIFF COMMISSION, IMPLICATIONS OF MULTINATIONAL FIRMS FOR WORLD TRADE AND INVESTMENT AND FOR U.S. TRADE AND LABOR (1973).

93. *E.g.*, New York City Human Rights Commissioner Eleanor Holmes Norton widely circulated a memorandum within New York's business community warning about the potential legal liability of placing the burden of economic cutbacks on minorities and women. Her memo said:

The economic risk to employers of large monetary awards to such laid-off employees [*sic*] is substantial, and the complications and practical difficulties arising from remedial orders have a tremendous potential for creating dislocation and discord.

N.Y. Times, Jan. 29, 1975, at 17.

See also comments on the AT&T settlement by David Copus, head of the EEOC's panel on AT&T. N.Y. Times, Jan. 19, 1975, at 1, where it was stated, "Employers won't have any trouble reading between the lines of this settlement. They are threatened if they discriminate."

Cf., Statement by the National Organization for Women (NOW) on AT&T Settlement, reported in the N.Y. Times, Jan. 19, 1973, at 49, calling the award "chickenfeed," compared to the \$4-billion that it said was really owed to the company's women employees.

See also *AT&T Settlement*, *supra* note 73.

marily the concern of those employers under court order to remedy past violations of the CRA and of federal contractors who must have an affirmative action program as part of their contractual obligations under a federal executive order. Employers in either of these two categories must establish goals for hiring and promoting traditionally under-represented minorities and women, based on the proportion of these groups in their labor pool. The labor pool varies depending on the job to be filled.⁹⁴ For example, a small factory looking for manual laborers may be able to set its goals so as to match the ethnic breakdown of the local community while a major university seeking to fill a faculty position in philosophy may be required to use the ethnic breakdown of the set of all recent philosophy Ph.D.s as its goal.

Application of the affirmative action principle to the foreign operations of a multinational presumably involves establishing goals based on the available and qualified American candidates throughout the world. Aside from the practical difficulties inherent in this venture, it is questionable whether MNEs will not be tempted to forego having certain positions designated "for Americans only." Also, the foreign operations of federal contractors are currently exempt from the affirmative action requirement under the executive order as recently interpreted.⁹⁵ This might be viewed as support for the position that affirmative action is inappropriate in the international setting. Nevertheless, the question of how an affirmative action program for the foreign operations of an American employer would work certainly deserves further examination.

Business planning consequences may also flow from the application of the CRA abroad. American-based MNEs may, for example, consider locating their bases of operations elsewhere. Although it is difficult to imagine that the incremental burden imposed by complying with the CRA will be dispositive of such an important decision, especially in light of the far more restrictive regulations to which MNEs are subject,⁹⁶ application of the CRA may become an important factor in deciding where to locate. This is particularly true if the MNE is, unlike its corporate ancestors, essentially "stateless,"⁹⁷ as various modern theorists

94. *James v. Stockham Valves and Fittings*, 394 F.Supp. 434, 495 (N.D. Ala. 1975).

95. 41 C.F.R. § 60-1.5(a)(3) (1976).

96. See comments of M.C. Kennedy, Director, Office of Investment Affairs, Bureau of Economic and Business Affairs, Department of State, in *THE NATION-STATE AND TRANSNATIONAL CORPORATIONS IN CONFLICT* 71 (Gunneman ed. 1975); the comments of S.H. Ruttenberg, *id.* at 72. The proposals at issue there included establishing a Security and Exchange Commission for investment, *i.e.*, "a screening process from the [government's] point of view."

97. H. STEPHENSON, *THE COMING CLASH* (1972); R. VERNON, *SOVEREIGNTY AT BAY* (1966). Stephenson makes the point that much of what we now consider mere size and complexity

have maintained. Admittedly, this position is not universally held.⁹⁸ Yet virtually all commentators agree that MNEs share certain common goals: profits, security, and flexibility.⁹⁹ While the importance of the security afforded an MNE by being American-based should not be underestimated,¹⁰⁰ it is clear that whether an MNE remains in the United States will depend upon the tradeoff between the sacrifice of flexibility in such areas as personnel policies and the nature of security and profits an MNE experiences by remaining in this country. Even without accepting the statelessness theory and all its ramifications, one must recognize the occurrence of this balancing process.

The problem of whether an MNE will be influenced to move its base of operations is distinct from whether it will be influenced in its decision where to establish affiliates. The possibility exists that the CRA will put American-based MNEs at a competitive disadvantage for certain

on the part of MNEs is in fact "international integration." *Supra* at 8.

Governments and public opinion in the industrial countries, comfortably accustomed to think of their countries as bases for international companies operating abroad, will with increasing force come to realize that they are themselves hosts to just such companies. As this process develops, one would expect to see social and political reactions within industrial countries, similar to those which have been considered immature from politicians in the Third World during the 1960's.

. . . .

It seems for the moment as if industrial management is the only organism which has found the capacity to emerge from the restrictive and increasingly irrelevant chrysalis of the nation state. In due course the pressure will become irresistible for a basic change in the attitudes of governments and trade unions alike.

Id. at 12, 175.

98. *E.g.*, N. CHAMBERLAIN, *THE LIMITS OF CORPORATE RESPONSIBILITY* 162, 169 (1973); T. GAINES, *MANUFACTURERS HANOVER TRUST ECONOMIC REPORT: U.S. BUSINESS ABROAD* 3 (1969).

99. *See generally* J. BEHRMAN, *DECISION CRITERIA FOR FOREIGN DIRECT INVESTMENT IN LATIN AMERICA* (1974); J. BEHRMAN, *U.S. INTERNATIONAL BUSINESS AND GOVERNMENTS* (1971); R. BLOUGH, *INTERNATIONAL BUSINESS: ENVIRONMENT AND ADAPTATION* (1966); C. CROSSWELL, *INTERNATIONAL BUSINESS TECHNIQUES* (1963); J. FAYERWEATHER, *INTERNATIONAL BUSINESS MANAGEMENT: A CONCEPTUAL FRAMEWORK* (1969); M. HODGES, *MULTINATIONAL CORPORATIONS AND NATIONAL GOVERNMENT* (1974); C. KINDLEGERGER, *AMERICAN BUSINESS ABROAD* (1969); J. SCHWENDIMAN, *STRATEGIC AND LONG-RANGE PLANNING FOR THE MULTINATIONAL CORPORATION* (1973); R. VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* (1971).

100. *Report, 7146-1.21 Disputes Involving U.S. Foreign Direct Investment: July 1, 1971-July 31, 1975*, Bureau of Intelligence and Research, Department of State, Feb. 28, 1974. "During the last two years alone, there were at least 87 instances of expropriation or nationalization, intervention, requisition, contract or concession, cancellation or renegotiation, and coerced sale [*sic*]."

Even Neil Chamberlain, an ardent critic of corporate policy making, recognizes, "However global the scale on which the firm operates, its basic security lies in its relationship to its home government." CHAMBERLAIN, *supra* note 98, at 162.

investment opportunities in the future.¹⁰¹ For example, American-based MNEs may be unable to select employees for assignment abroad due to the prejudices or predispositions of the host country's business community. However, the likelihood of the CRA's application being sufficient to tilt the scales of investment decision in light of the host country's alternative tactics and other relevant factors is, again, most unlikely.

The MNE might also respond to the CRA's foreign application by employing fewer Americans abroad. Section 703 of the Act very clearly exempts aliens abroad from the CRA's coverage, and the employment and training of local labor is likely both to win favor with the host government and to provide a larger profit margin.¹⁰² There are, however, two major factors which mitigate against such a reaction by the MNE: the scarcity of skilled local labor capable of managing an affiliate, and the psychological predisposition in many American-based MNEs to employ Americans in positions of authority.¹⁰³ In addition, some studies indicate that the number of Americans employed in managerial positions in an American MNE's foreign operations is a function of that MNE's relative stage of development.¹⁰⁴ The burden of compliance with

101. Villanueva, *The Case For and Against the Multinationals*, 10 CONF. BD. REC. 61 (1973). Villanueva argues that one positive sign for the future is the spread of competition among multinationals from different countries. This, he argues, should "inject a healthy element of choice for developing countries." What is healthy for the host country need not be healthy for the MNE or the base country, however.

An example of investment opportunities which might be made more difficult as a result of enforcement of the CRA abroad are the dealings of American-based oil MNEs with the countries participating in the Arab boycott. *But see* note 78 *supra*.

102. Woodroffe, *The Social Role of Multinational Enterprises*, 10 CONF. BD. REC. 57, 58 (1973). Woodroffe argues that varying local conditions require both decentralized policy decisions and the utilization of domestic managerial personnel:

Clearly, decisions taken at headquarters should be kept to essentials and local management should be given wide independence within guidelines laid down by the center. These guidelines will be the international policies of the company such as the kind of products the company wants to make and sell, marketing strategies for international products in contrast to purely local products, the objectives for yield on capital employed, the policy on local borrowing. . . .

If the majority of the local management are nationals, as they should be, then it is sheer commercial common sense, since they have a far more intimate knowledge of the country, its customs and its people than the center could ever hope to attain. . . .

103. *See* Franko, *Who Manages the Multinational Enterprises*, 8 COLUM. J. WORLD BUS. 30 (1973); Roach, *Weighing the Foreign Work Force; U.S. Executives Compare the Performance of their Employees Around the World*, 11 CONF. BD. REC. 6 (1974); U.S. TARIFF COMMISSION, *supra* note 92, at 645, 679-80, 682.

104. Franko, *supra* note 103, at 35:

Surveys of U.S. company staffing practices in Canada, Belgium, the United

the CRA is unlikely, then, to be sufficient to cause significantly increased displacement of American labor.

Finally, the possibility remains that the MNEs will, as a business tactic, seek either to have the CRA amended or local enforcement of it accepted.¹⁰⁵ Given the deeply-held nature of this nation's civil rights commitment, amendment of the CRA is unlikely. Moreover, there are signs that in recent years MNEs have become more socially conscious, as is illustrated by corporate involvement in the effort to overcome world hunger.¹⁰⁶

With the exception of a minimally diminished competitive stance, the application of the CRA is likely to have only minor effect on the MNE's everyday course of business. The major impact remains in the area of internal personnel administration, and there the effect is presumably no greater than on the wholly domestic corporation.

B. THE HOST COUNTRY

The host country has economic as well as social interests it wishes to protect just as the MNE does. To the extent these interests are adversely affected by the application of the CRA abroad, there is cause for concern. However, the consequences of CRA application for the vast majority of host countries are either neutral in nature or advantageous to them.

Kingdom, and India have shown that . . . eventual fade-out of U.S. managers after start-up has been typical of U.S. company practice. The authors of these surveys . . . reach the same conclusion: the proportion of local nationals who are presidents or managers of U.S. company manufacturing subsidiaries increases markedly with the age of the operation. . . .

Expatriates did reappear in command of subsidiaries in those U.S. firms that followed a strategy of extending a limited product line around the globe. . . .

General managers with supranational responsibility for multi-country regions were called upon to facilitate the process. No less than 49 of the 170 U.S. firms generally considered multinational had moved to regional headquarters management by 1967.

105. This type of recourse has been conceptualized in the literature as an attempt by the MNE at controlling the corporate environment, or "external relations." It has been elevated to an art form, and is apparently considered both legitimate and necessary by many MNEs. Presumably in the context of adverse legislation it only calls for lobbying. Cf. Recent reports of political payoff scandals. *Gulf Seeks Repayment of Political Contributions*, N.Y. Times, Mar. 5, 1976, at 1. See generally Boddewyn & Kapoor, *The External Relations of American Multinational Enterprises*, in *MULTINATIONAL CORPORATIONS AND WORLD ORDER* 31-32 (G. Modelski ed. 1972), wherein it is stated, "[E]xternal relations . . . is that function of the firm concerned with enlisting the support or negating the opposition of those nonmarket and macro-managerial collectivities that actually or potentially affect its existence and prosperity."

106. Hall, *Mobilizing the Multinational*, 12 CONF. BD. REC. 47 (1975).

As noted earlier, if the MNE displaces Americans with local labor, the host government will surely not object. However, if the MNE abides by the CRA for its American labor force only, a dual personnel system may evolve. This, however, may have beneficial consequences because it brings to bear pressure in favor of equality of opportunity.¹⁰⁷ Some commentators, on the other hand, have maintained that this pressure to comply with an American business standard is mere "arrogance."¹⁰⁸

The social effects of CRA application may also be problematic. One of the most heralded benefits developing countries have to derive from a multinational is supposedly its managerial expertise.¹⁰⁹ A certain level of deference to local custom is also deemed necessary to promote general efficiency, which American managerial "know-how" alone could not accomplish.¹¹⁰ However, one of the more regular criticisms leveled at American MNEs is that they "show little tolerance for diversity."¹¹¹ The Chairman of First National City Bank explained this common host

107. L. TURNER, *MULTINATIONAL COMPANIES AND THE THIRD WORLD* (1973). Proper strategy for the opponents of apartheid, for example, is allegedly something short of insisting the MNEs refrain from doing business with racist regimes.

Multinationals who argue that they are building bridges are undoubtedly kidding themselves. There is, however, an excellent case for their staying on — as Trojan horses, which can be used to help black Africans in their political struggle . . . [in South Africa]. No locally owned company is ever going to pioneer schemes like giving blacks equal pay for equal job opportunities with whites, but the multinationals can be pressured in these directions. This is important for two reasons. First, it matters that the absolute wages of black Africans get pushed up as high as possible, since political activities become easier the less one has to worry about providing for basic needs like food and housing. Second, the multinationals are much more likely than locally owned companies to get into well-publicized confrontations with the government on issues like the job-reservation laws. The more important the companies concerned, the greater their impact on political awareness both within and without the country . . .

The correct strategy for anti-apartheid forces is thus to pressure multinationals into significantly improving the conditions of their black workers and into confrontations with the government.

As long as this racist regime relies on multinationals, it is not entirely master in its own house.

Id. at 247.

108. Marshall, *Legal Limitations on MNC (Multinational Corporation) Activities and the Problem of Arrogance*, *THE NATION-STATE AND TRANSNATIONAL CORPORATIONS IN CONFLICT*, *supra* note 96, at 43, 45, 48.

109. Hall, *supra* note 106.

110. There seems to be a generally recognized concept of the optimal mix of American "know-how" and "traditional indigenous business practices." Richman & Copen, *Management Techniques in Developing Nations*, 8 COLUM. J. WORLD BUS. 49 (1973).

111. *E.g.*, Ajami, *Corporate Giants; Some Global Social Costs*, in *MULTINATIONAL CORPORATIONS AND WORLD ORDER* 113, 115 (G. Modelski ed. 1972).

country reaction as evolving from a fear of exposure to a changing value system brought on by a new technology.¹¹² "The acceleration of change brought to a community by a world corporation unfortunately tends to make the old values look even better to many people."¹¹³ Socialist commentators describe this phenomenon as a proper reaction to the social harm caused by America's "economic imperialism."¹¹⁴ To the extent that a MNE abiding by the CRA is viewed by the host government as fostering cultural imperialism, social discord, or the like, one consequence of the Act's enforcement will be a heightened level of disharmony between the host government and the MNE.¹¹⁵ For example, separate treatment of American employees may well offend a local sense of propriety. Furthermore, the inability to give sufficient deference to local business practices because of CRA enforcement may have detrimental effects on the MNE affiliate's efficiency. With required nondiscriminatory treatment of Americans, theoretically a more "optimal" efficiency position might be achieved. However, the extent to which CRA application will affect production will vary considerably. It should be remembered in this regard that American employees abroad are generally highly educated and likely to be filling managerial positions. This functional distinction may well create an artificial social distinction between groups such that application of the CRA goes completely unnoticed.

Finally, host countries have an arsenal of legal tools available to them to minimize the impact of the CRA. Most importantly, they may simply deny visas to any disfavored group, such as Jews, Christians, Blacks, or Whites. Alternatively, they may attempt to forbid enforcement of the CRA. This would parallel decisions by courts in this country which have excluded external social policies on the ground that they violate the public policy of the forum state. For example, in the case of *American Jewish Congress v. Carter*,¹¹⁶ a New York State court decided that an

112. Wriston, *The World Corporation; A New Weight In An Old Balance*, 10 CONF. BD. REC. 53 (1973).

113. *Id.* at 56.

114. Sweezy & Magdoff, *Notes on the Multinational Corporation*, 5 MONTHLY REV. 1-7; 6:1-13 (Oct. and Nov. 1969).

115. Of course breaking down these prejudices may be the natural and proper function of the Act, even abroad. See discussion of "customer preference" accompanying text of note 19 *supra*.

116. 23 Misc. 2d 446, 190 N.Y.S.2d 218 (Sup. Ct. 1959). But see *South African Airways v. New York State Division of Human Rights*, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970); *New York Times Co. v. City of New York*, 79 Misc. 2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. 1974), *aff'd*, 49 App. Div. 2d 851, 374 N.Y.S.2d 209 (1st Dep't 1975); Herzog, *Conflict of Laws*, 23 SYRACUSE L. REV. 435 (1972); Note, *Republic of South Africa's Visa Policy*, 13 HARV. INT'L L.J. 132 (1972).

Arab-based MNE company must cease practicing its home country's discriminatory social policy in New York State. The MNE, following the established policy of the Kingdom of Saudi Arabia, apparently had sought to recruit only non-Jewish employees in New York. The court ruled that an applicant's religion could not be a BFOQ under New York's law, despite the fact that MNE's home country policy actually required such discrimination. In ringing language the court declared:

This court does not pretend to assert that Saudi Arabia may not do as it pleases with regard to whom it will employ within the borders of Saudi Arabia. Nor does this court pretend to say that Aramco [the MNE] may not hire whom it pleases to conform to its Arab master's voice. What this court does say is that Aramco cannot defy the declared public policy of New York State and violate its statute within New York, no matter what the King of Saudi Arabia says.

....

If, as perhaps correctly claimed by Aramco, this must result from the necessity of possible employment in Saudi Arabia, the answer of New York State is simply — *Go elsewhere to serve your Arab master — but not in New York State.*¹¹⁷

Enforcement of the CRA abroad may well result in outraged judges in the host country issuing opinions in similar tones when they perceive violations of their nation's employment policies, thereby disrupting international comity.¹¹⁸

In conclusion, some disruption of the normal business routine may be expected. In host countries which have countervailing social norms, the equality required by the CRA may be judicially prohibited, or thwarted by the country's visa policy. Even in those countries where there is only a countervailing social custom or where the CRA's policies are administered in such a way as to gain the host country's enmity, some disharmony may result from CRA application. Whether this discord will have a measurable impact on the MNE's efficiency or on its ability to compete effectively will vary greatly from country to country and even company to company.

117. 23 Misc.2d at 448-49, 190 N.Y.S.2d at 221-22 (emphasis in original).

118. One crucial difference would be that New York was dealing with a foreign recruitment policy being imposed on *its* citizens in New York. The CRA abroad only applies to Americans. The obverse situation could not happen. In other words, a Saudi judge would not find himself in a situation where an American MNE had discriminated among Saudis in order for the MNE to comply with the CRA.

C. THE UNITED STATES

The United States uses the MNE as a tool in its foreign policy,¹¹⁹ as a means to facilitate trade,¹²⁰ and, arguably, as a device for foreign social control.¹²¹ It consequently would be disastrous for the United States if American-based MNEs were to move their operations elsewhere or to encounter a significant competitive disadvantage either in their current operations or in seeking out new markets.

Despite the importance of MNEs to the United States, no uniform policy toward them has emerged.¹²² Rather, the government has devised a number of ad hoc policies as the need has arisen.¹²³

There have been, for example, guarantees of their foreign investments, measures to discourage foreign governments from expropriating them, application of United States antitrust laws to their activities abroad, prohibition on trading with selected foreign countries, revised tax laws applicable to their earnings, and orders that they deploy their financial resources to accord with United States balance of payments objectives.¹²⁴

Given this complex array of regulatory hurdles, it is most unlikely that the single additional requirement of obeying the CRA abroad would be

119. Sweezy & Magdoff, *supra* note 114; CHAMBERLAIN, *supra* note 98. Chamberlain argues that when there is a "conflict of objectives" between host government and base government, the latter governs the actions of the MNE. The United States has thus used the MNE directly to implement its foreign policy. Chamberlain cites two examples. 1) When a French subsidiary of an American firm on its own initiative sold 500 trucks to Communist China the American parent intervened to cancel the order. It did this because it was compelled to do so under United States law despite the fact that it thereby subjected its French subsidiary to legal action for breach of contract. *Id.* at 162. 2) In a similar fashion, Sperry-Rand's working control of a Belgian firm manufacturing farm equipment enabled the United States to refuse to permit it to export equipment to Cuba. This in fact caused questions to be asked in the Belgian Parliament "why a company located in an economically depressed part of the country should be forced to lose the equivalent of forty days' work for 2,400 workers because of American commercial foreign policy." *Id.*

120. Domestic and International Business Administration, Department of Commerce, OVERSEAS BUSINESS REPORT OBR74-69 (Dec. 1974), at 1:

In 1973 U.S. exports to Western Europe amounted to \$21.4 billion, representing nearly a third of total U.S. sales abroad. Canada remained our largest single-nation foreign market, with U.S. sales of \$15.1 billion. These substantial magnitudes reflect the generally high income levels of Western Europe and Canada, as well as the similarity of their markets to ours.

121. See generally Sweezy & Magdoff, *supra* note 114; Ajami, *supra* note 111.

122. Vagts, *The United States of America and the Multinational Enterprise*, in NATIONALISM AND THE MULTINATIONAL ENTERPRISE 165 (H. Hahlo, J. Smith, R. Wright eds. 1973); TINDALL, *supra* note 2.

123. TINDALL, *supra* note 2, at 186.

124. Stevens, *Scanning the Multinational Firm*, 1971 BUSINESS HORIZONS 54.

the straw which breaks the camel's back. In the current absence of any uniform policy governing MNEs, application of the CRA abroad cannot be objected to on the grounds of possible domestic injury to the United States.

CONCLUSION

The question of whether the CRA has any extraterritorial application depends on many factors. The more obvious have been examined here: statutory construction, legislative history, international law, and economic consequences. Although there has not been a flurry of CRA litigation in the wake of the renewed vigor of the Arab boycott, the answer to the question of whether the CRA applies abroad is less clear than many had assumed. Even in the absence of any authoritative court ruling on the matter, the possibility alone should be reason for concern to MNEs. It is certainly possible that in the not too distant future the Court may find that the CRA clause exempting aliens abroad meets the test of "affirmative intention . . . clearly expressed" set out in cases such as *McCulloch*, thereby establishing that Americans abroad are covered by the Act. The existence of this possibility should alert American MNEs to the potential liability they may incur by inaction and to the added governmental regulation of their activities which noncompliance with the CRA may induce.

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